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Supreme Court, Appellate Division, Third Department, New York

Matter of ELIZABETH PICONE, Appellant,

v.

PUTNAM HOSPITAL et al., Respondents.

WORKERS' COMPENSATION BOARD, Respondent.

Decided September 14, 2017

Facts: The claimant had a prior non-work related injury to her left knee and had two surgeries to said knee seven years apart. Five years after the last surgery the claimant slipped on ice while working and the claim was established for the left knee. The WCLJ found that the claimant had a 35% schedule loss of use of the left leg, but apportioned 50% to the prior non-work-related injury, resulting in a 17.5% award. The Board affirmed and the claimant appealed.

Holding: *Affirmed.*

Disposition: "Apportionment may be applicable in a schedule loss of use case if the medical evidence establishes that the claimant's prior injury – had it been compensable – would have resulted in a schedule loss of use finding." Here, both the claimant's treating doctor and the carrier's consultant found a percentage apportionable to the prior non-work-related injury and the Board's decision was found to be supported by substantial evidence.